

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

| | | |
|---|---|--------------------|
| In the Matter of |) | |
| |) | |
| Petition of Public Knowledge, et al. |) | |
| |) | |
| For a Declaratory Ruling that Text |) | WC Docket No. 08-7 |
| Messaging and Short Codes are Title II |) | |
| Services or Are Title I Services Subject to |) | |
| Section 202 Nondiscrimination Rules |) | |
| |) | |

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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COMMENTS OF CTIA - THE WIRELESS ASSOCIATION®

I. INTRODUCTION

CTIA – The Wireless Association® (“CTIA”)¹ hereby submits comments opposing a Petition by Public Knowledge, et al. (“Petitioners”) proposing to regulate the Short Messaging Service (“SMS” or “text messaging”) and Common Short Codes (“CSCs” or “Short Codes”) as Title II services, or in the alternative, to apply a nondiscrimination requirement to the services under Title I.² Such action is neither warranted by market failure, nor is it a sound exercise of Commission discretion as a matter of law or policy. The Commission should dismiss the Petition.

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² Public Knowledge, et al., Petition for Declaratory Ruling Stating that Text Messaging and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules, WT Docket No. 08-7 (Dec. 11, 2007) (“*Petition*”).

A. Summary

Wireless carrier practices regarding SMS and Short Codes are designed to protect consumers, not restrict them. As discussed in greater detail below, SMS and Short Codes are distinct services.³ Wireless carriers do not block SMS between wireless consumers, but they do use filtering to protect consumers from unwanted and costly spam. With regard to Short Codes, wireless carriers have policies to protect their subscribers from offensive, abusive or fraudulent material, and refuse to load Short Codes onto their networks that they reasonably believe pose such threats.

Because it is the wireless carrier's subscribers that will interact with the third party marketer or advertiser, the carrier carefully scrutinizes proposed Short Code marketing campaigns. Industry and carrier policies regarding Short Codes are designed to restrict offensive content and activities, such as: intense profanity or violence; graphic depiction of sexual activity; nudity; hate speech; graphic depiction of illegal drug use; or activities that are restricted by law to those over 18, such as gambling or lotteries. In their separate comments, wireless carriers will provide examples of the types of Short Code campaigns they have rejected. Because wireless carriers value their customer relationships and their reputations with the public at large, it is entirely appropriate for a wireless carrier to ensure that marketing tools it provides are not used to defraud customers or as a means of transmitting unwanted, obscene or indecent content to wireless subscribers.

The ability to protect consumers from fraud, illegal or objectionable material through use of Short Codes is one that exists solely with carriers. Over two decades of failed pay-per-call legislation, regulation, and litigation proves that point. That

³ See *infra* Section I.B.

experience shows that any attempts by the Commission to subject SMS or Short Codes to common carrier regulations – either directly through Titles II or III or indirectly through Title I ancillary jurisdiction – will only unlock a Pandora’s Box of additional regulation and litigation that in the end will provide few if any protections to consumers. Because wireless carriers, as private actors, are not constrained by the First Amendment (indeed are protected by the First Amendment), they will be more effective than the FCC at responding to consumer demands and complaints.

The Commission, therefore, must first reject the Petitioners’ contention that SMS is a commercial mobile radio service (“CMRS”) because it is interconnected with the PSTN (“public switched telephone network”).⁴ This contention reflects a fundamental misunderstanding of the nature of SMS, which, unlike traditional mobile voice service, is not an interconnected service. Petitioners further wrongly argue that SMS is not an information service because it is not a broadband Internet access service and makes no use of the Internet.⁵ As the Commission has concluded in many occasions, information services are not limited to Internet access services.

The Commission must then reject attempts to regulate SMS and Short Code services as Title II services, subject to the Commission’s common carrier obligations. Such a classification would upend the regulatory structure of the Communications Act of 1934, as amended (“Act”) and is inconsistent with established Commission precedent. Both SMS and Short Codes are classic examples of information services, which fall under Title I of the Act. Utilizing both “store and forward” methods as well as protocol conversion to deliver the services, SMS and Short Codes more closely resemble email

⁴ Petition at 8-12.

⁵ Petition at 10-11.

than traditional switched voice calls. The Commission should reject the Petitioner's calls to regulate these services under Title II.

Similarly, the FCC should reject Petitioners' calls to require the non-discriminatory provision of Short Codes pursuant to Title I.⁶ Carriers must retain the ability to implement Short Code policies intended to protect consumers from fraud, spam, and objectionable material. The Commission recognized just this point in refusing to exercise its Title I jurisdiction to require interexchange carriers to provide billing and collection services to information providers using 900 numbers. Just like in the pay-per-call service context, wireless carriers are lending their name and reputation to marketers wishing to use a Common Short Code. Accordingly, they should be given the same latitude to reject Common Short Codes. That latitude should include the right to reject the Common Short Codes of competitors, just as broadcasters are under no legal obligation to carry advertisements for competing networks.

As with billing and collection functions, alternative channels abound for third party marketers to disseminate messages or advertising. These include not only traditional print and over-the-air media but also the Internet and the continued use of SMS messaging itself. The Commission should heed the lessons that were learned in the pay-per-call context and continue to allow carriers to operate in the competitive marketplace to provide customers with the service and protections they demand. The refusal to recognize a Short Code in no way eliminates the ability to use SMS messaging and provides consumers with the protections that they— and the government— demand from telecommunications providers.

⁶ Petition at 19-24

In sum, the proposed regulation of SMS and Common Short Codes is neither sound public policy, nor a legally sound exercise of the Commission’s regulatory authority. The Commission should dismiss the pending Petition.

B. Common Short Codes and Text Messaging are Not the Same Thing

At the outset, it is critical that the Commission have a correct understanding of SMS messaging and Short Codes and the distinction between the two. Petitioners mischaracterize both offerings and blur the distinction between them⁷ in an apparent effort to turn allegations regarding refusals to recognize Short Codes into a justification for imposing common carrier regulation on both.⁸ Properly described, however, both SMS messaging and Short Codes are clearly information services and not telecommunications services. Moreover, the Petition contains not a single instance of discrimination in the provision of SMS, and there is no evidence that carriers block text messages sent by wireless customers. The Petitioner’s request that the Commission extend common carrier obligations to SMS is based solely on alleged discrimination by wireless carriers in the recognition of Short Codes, a completely distinct service, and should, for that reason alone, be rejected.

The discrete nature of SMS and Short Code services is readily apparent. SMS is a service that enables the sending and receiving of short— typically 160 characters or fewer—text messages to or from mobile phones. Although SMS is commonly associated with person-to-person texting, SMS supports a host of applications. SMS can, for example, be used to send or receive information in binary form, such as pictures or ring

⁷ Petition at 1 (discussing “text messaging” to include both SMS and Short Codes).

⁸ An example of this is found in the following passage: “[Consumers] do not expect that their carrier might choose not to deliver short codes to some parties . . . [t]hus it is also in the public interest to impose nondiscrimination obligations on SMS offerings.” Petition at 15.

tones.⁹ By contrast, a Short Code, as its name implies, is merely an address. It is a short string, typically 5 or 6 digits long, that serves as the address of an application to which a mobile subscriber may send a short text message, not a voice call. Short Codes make use of SMS capabilities, but they are not text messages, and they are not “phone numbers” as Petitioners misleadingly suggest.¹⁰

Short Codes are used to facilitate text communications between wireless subscribers and third parties as part of marketing or advertising campaigns. These marketers lease Short Codes and then advertise them in other media such as newspapers, websites or television shows. For example, a television show may broadcast a Short Code by urging viewers to text the name of their favorite American Idol contestant to that code, such as 47437. Other groups may also market their information or product through the use of Short Codes. Short Codes are an entity’s mobile marketing address. By sending a message to a Short Code, a wireless subscriber indicates his or her consent to receive marketing materials (whether marketing a product or position) or alerts from the entity that leased the Short Code.

Understanding the discrete nature of these services and the fundamentally different roles they perform exposes the confusion the Petition seeks to perpetrate. The Petition begins with assertions that some wireless carriers have engaged in discrimination by refusing to provision Short Codes on their networks.¹¹ It then conflates Short Codes and SMS into something called “texting services.” Without alleging any problems with

⁹ See e.g., Short Message Service/SMS Tutorial, *available at* <http://www.developershome.com/sms/> (“Besides text, SMS messages can also carry binary data. It is possible to send ringtones, pictures, operator logos, wallpapers, animations, business card (e.g., VCards) and WAP [Wireless Application Protocol] configurations to a mobile phone with SMS messages.”).

¹⁰ See Petition at 3.

¹¹ Petition at 3-6.

SMS, the Petition urges the regulation of these “texting services,” by which the Petition means SMS and Short Codes interchangeably.¹² The Commission, as the expert agency, should not countenance Petitioners’ effort to regulate one service, SMS, based solely on allegations regarding a completely different service, Short Codes.

Apart from allegations regarding Short Codes, the Petitioners’ call for common carrier regulation is predicated on assertions that “text services” fall within the definition of Commercial Mobile Radio Service “(CMRS)” because they are interconnected with the Public Switched Telephone Network (“PSTN”). Here, however, Petitioners rely solely on claims, erroneous as explained below, that SMS qualifies as an interconnected service. Additionally, leaving aside for the moment the Petition’s factual errors regarding the true nature of SMS, including an erroneous assertion that the Commission has effectively decided the regulatory classification of SMS in the *Roaming Reexamination Order*,¹³ the Petitioners also provide no basis to conclude that *Short Codes* are interconnected with the PSTN. The Petitioners’ implicit claim that Short Codes are a CMRS is based solely on the mistaken assumption that SMS is an interconnected service. Since the Petition lacks a factual predicate, it should be rejected outright.

II. AS A MATTER OF POLICY, THE COMMISSION SHOULD NOT REGULATE TEXT MESSAGING OR COMMON SHORT CODES

Carriers carefully tailor their policies with regard to both SMS and Short Codes to address consumers’ demand that spam, and unwanted and objectionable material not inundate their wireless devices. Current policies address those desires and are only

¹² Petition at 6.

¹³ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, n.134 (2007) (“*Roaming Reexamination Order*”).

possible because the Commission's light regulatory touch under Title I enables private actors to protect consumers in ways that government cannot.

There is no compelling reason for the Commission to regulate these two services. Carrier practices do not block text messages between wireless consumers. Consumers are free to send text messages to each other without fear that the message will be denied because of the content of the message. In the Common Short Code space, however, carriers are not dealing with messages between consumers, but messages from third parties who wish to advertise or market their products to wireless consumers. Carriers must maintain the ability to adopt policies to protect consumers from fraud, unwanted and objectionable material. The Commission should dismiss this Petition that seeks to prevent carriers from employing these pro-consumer policies.

A. Carrier SMS Policies Are Reasonable and Designed To Protect Consumers

Wireless carriers' policies with respect to SMS and Short Codes originated in response to the wants and needs of consumers. Carriers do not block SMS messages between wireless consumers. Consumers and government officials agree that wireless customers should have the ability to easily and seamlessly message each other while being protected from fraud, abusive spam, and objectionable material. Carrier policies with regard to both SMS and Short Codes do just that.

1. Carriers Do Not Block SMS Between Two Wireless Consumers

Since the creation of SMS, wireless carrier policies and technologies have evolved to respond to the demands of customers. Customers wanted the ability to send and receive text messages with other wireless customers on any network. Despite the technological difference described above, carriers responded by working with third

parties to make the two systems compatible through store and forward technology and protocol conversion to give consumers the connectivity they demanded. Wireless carriers do not pick and choose which SMS messages to deliver to their customers. So long as an individual customer does not send so many identical text messages that they trigger the carrier's spam filter, text messages are received, converted, stored and forwarded without regard to the content of the message or the ultimate recipient. Contentions to the contrary notwithstanding, this policy has governed the wireless industry since inter-carrier messaging was introduced.

2. Carriers Do Block Some Text Messages That Originate on the Internet to Protect Customers from Spam and Fraud

While carriers do not block peer-to-peer text messaging, in response to consumer demand, carriers do block some messages that originate on the Internet. As described above, text messages can originate on the Internet for delivery to mobile customers' handsets. This capability has expanded the use of the text messaging service for customers, but has also enabled spammers access to wireless customers. Individual carriers block as many as 200 million text message advertisements from the Internet each month. Wireless carriers even go so far as taking spammers to court to protect their customers from unwanted and costly advertising.¹⁴

Wireless carriers employ a number of technologies to protect consumers from spam. Among the tools at carriers' disposal is the use of filters at the gateway between

¹⁴ Kim Hart, "Advertising Sent To Cellphones Opens New Front In War on Spam," THE WASHINGTON POST, A1 (Mar. 10, 2008).

the Internet and the carriers' messaging network. These filters analyze traffic from the Internet using a number of methods including analyzing the volume of messages from one sender and commercially available lists of spammers in effort to prevent consumers' inboxes from being inundated with unwanted messaging. While email spam is an annoyance, volumes of text spam can cost customers more than their time. Carriers offer customers the choice of purchasing text messaging packages or paying for each message. For those customers who choose to pay for each message, text message spam can cost them money.

Text message spam is a very real threat. According to M:Metrics, 28 percent of wireless customers who received a text advertisement did not opt-in to the advertising.¹⁵ Unwanted advertising is not the only text message-based threat from the Internet. In the same way that "phishing" attempts to trick customers into revealing personal information over email or instant messages, "smishing" targets wireless customers. "Smishers" send messages to wireless customers that purport to come from trusted sources, like the customer's bank or PayPal, and request that the customer provide personal passwords or other information to "verify" their accounts.¹⁶ Carrier blocking of known spammers and those who would defraud consumers protects wireless customers without impacting the consumers' ability to access the information they want.

¹⁵ *Id.* (citing M:Metrics survey data).

¹⁶ *Id.*

While the action the Petitioners request will prevent carriers from adopting policies to protect consumers in this area, the State of Florida has affirmatively asked carriers to get *more* involved in preventing consumer fraud in Short Codes. As is discussed below, the Florida Attorney General entered into a voluntary agreement with AT&T Mobility to assure just such monitoring of Short Code marketers and advertisers.¹⁷ Carriers should not be prevented from providing consumers with this valuable protection.

B. Carriers' Short Code Policies Are Designed To Protect Consumers From Fraud and Unwanted or Objectionable Material

Carriers must maintain the ability to protect their subscribers from offensive, abusive or fraudulent material, and to refuse to load Short Codes onto their networks that they reasonably believe pose such threats. Because wireless carriers value their customer relationships and their reputation with the public at large, it is entirely appropriate for wireless carriers to ensure that marketing tools it provides are not used to defraud customers. For the same reasons, it is appropriate for wireless carriers to ensure that such marketing tools are not used as a means of transmitting unwanted, obscene or indecent material to wireless subscribers. Action by the Commission to limit carriers' ability to reject Common Short Codes will leave customers exposed to fraud and unwanted or objectionable material.

The reality of the situation is that the adult industry is already targeting the mobile marketplace. Mobile pornography was a \$775 million dollar industry in Europe in 2007,

¹⁷ See *infra* Section II.C.

and is expected to reach \$1.5 billion by 2012.¹⁸ At a recent Mobile Adult Content Congress trade show in Miami, adult content providers prepared to make a move in the U.S. wireless content market.¹⁹ In the absence of continuing efforts by wireless carriers, the adult content industry will be firmly ensconced on wireless handsets in the same way that dial-a-porn created a nuisance in the wireline space in the 1980s and 1990s.

1. Commission Experience with 900 Number Services Should Color Its Decisions on Common Short Codes

This is not the first time that the Commission has faced the prospect of protecting consumers from fraud and unwanted and indecent marketing and advertising in the telecommunications space. Pay-per-call services provide an interesting analogue to the current questions regarding the regulatory treatment of short codes and text messaging. Much of the same rhetoric used by the Petitioners about the promise of text messaging and short codes was used in the past by proponents of pay-per-call services.

Pay-per-call services looked very promising in the late 1970s and early 1980s as a medium that would allow people to get exactly the information they wanted— sports scores, stock quotes, weather, etc.—in an efficient, easy-to-access manner.²⁰ Pay-per-call was also going to help change democracy— the first “primetime” use of these services was during the Presidential debates of 1980 when viewers were allowed to call

¹⁸ “Sex To Spice Up U.S. Cell Phones in 2008,” Reuters (Jan. 30, 2008).

¹⁹ *Id.*

²⁰ “There are a number of different types of 900 services available today, including live, informational, interactive and polling services. The specific applications are quite varied.” *In the Matter of Policies and Rules Concerning Interstate 900 Telecommunications Services*, Notice of Proposed Rulemaking, 6 FCC Rcd 1857 ¶ 4 (1991) (“900 Services NPRM”).

one phone number or another to vote for who won the debate.²¹ Unfortunately, problems arose that undercut the promise of these services.

It was not long before consumers and policymakers took notice of the growing amount of socially objectionable material distributed via pay-per-call services (predominantly in the form of so-called “dial-a-porn”), and of a rising number of deceptive and fraudulent practices. Unfortunately, carriers’ hands were tied – a combination of regulation and convention stemming from regulation left carriers with a duty to deal, while marketplace conditions left policymakers generally reluctant to give the phone companies much discretion over to whom they would provide service. As a result, when problems arose in the pay-per-call business, government had to intervene— first in an attempt to address dial-a-porn, and then to address allegations of deceptive and fraudulent practices. However, government is constrained by the First Amendment and other considerations in ways that private actors are not. Consequently, the results of Commission and Congressional efforts to regulate the pay-per-call industry were protracted and only marginally effective. The results of the Commission’s attempts to regulate pay-per-call services suggest that, if a marketplace is workably competitive— like the wireless marketplace— private actors, acting in the interests of their customers, are probably going to be more effective at responding to consumer demands and complaints than government regulation.

²¹ “During the 1980 Carter/Reagan debates, [a 900 service] was used as a simple call counter -- viewers were asked to call one number if they thought Carter won or to dial a second number if they thought Reagan won....Not until 1989 did AT&T offer an interactive service where 900 callers could talk to an operator or make selections using the tone signaling capability of push button phones.” *Report, Carriers and Code Assignments For 800 Service, 900 Service and Carrier Identification Codes*, Industry Analysis Division, Federal Communications Commission, October 31, 1990.

The Commission recognized just this point in refusing to exercise its Title I jurisdiction to require interexchange carriers to provide billing and collection services to information providers using 900 numbers. In that case, Sprint Telemedia had withdrawn its offer to perform billing and collection services because of the problems it encountered with abusive and fraudulent practices by entities marketing and advertising 900 number services.

Finding that the billing and collection function was not a common carrier service, the Commission concluded that Sprint's withdrawal was a "reasonable response" to concerns that Sprint's reputation was being harmed by unscrupulous businesses utilizing 900 number services.²² Moreover, pointing to competitive alternatives and the continuing common carrier obligation to provide transmission services for 900 number service, the Commission found that Title I ancillary jurisdiction was not necessary to protect the rights of information providers to disseminate their messages or to spur innovation.²³ The Commission should take the same approach with respect to Common Short Codes and dismiss the Petition.

a. General Regulatory Treatment of Pay-Per-Call Services

The history of the regulation of "pay-per-call" services provides the Commission a preview of the tasks it will face if the Petitioners' requests are granted and carriers are forced to accept text messages and Short Codes on a nondiscriminatory basis.

²² *In the Matter of Audio Comm., Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 8697 ¶¶ 34-35 (1993) ("*Audio Comm*") (finding that withdrawing billing and collection was a "reasonable response" to unpopular 900 services). Even though carriers could withhold billing and collection services, the Commission nonetheless required carriers to provide, on a nondiscriminatory basis, the basic transmission services that enabled 900 calling. As discussed below, this requirement hampered carriers' ability to screen out abusive 900 services. Subsequent Congressional and FCC efforts to regulate 900 service providers directly were invalidated by the courts, leaving consumers with no protection.

²³ *Audio Comm.*, 8 FCC Rcd at ¶ 31.

One parallel between pay-per-call services and wireless Short Code/text messaging service is the industry's structure. In the case of wireless Short Codes, there are the advertisers and marketers that use the service provided by the wireless carriers to engage existing and potential customers via Short Codes and text messaging. In the case of pay-per-call service, a similar dual structure emerged, with the local and long distance phone companies offering the basic transmission service and phone number, as well as billing and collection services, and the marketer to provide the service (stock quotes, sports scores, weather, adult entertainment, etc.).²⁴ Other parties that might be involved include a service bureau and a separate billing and collection company.

The Commission's decision in the *Second Computer Inquiry* ("*Computer II*") to distinguish between basic services and enhanced services had a direct effect on pay-per-call services.²⁵ This effect was made explicit in the Computer II Order on Reconsideration, where the Commission explicitly ruled that AT&T's "Dial-it" pay-per-call service was an enhanced service.²⁶

In 1986, the Commission detariffed billing and collection services, concluding that there was competition in the market for such services.²⁷ As a result, interexchange carriers ("IXCs") and local exchange carriers ("LECs") now had some leverage in their

²⁴ "Information providers" is the term used to describe the party that "designs, promotes, and sells the information program and determines its price, subject to any restrictions imposed by the telephone companies that transmit the call." Comment of the Staff of the Bureau of Economics and Consumer Protection of the Federal Trade Commission, filed in CC Docket 91-65, at 11 (July 2, 1991) ("*FTC Comments*"). In the case of 900 number calls, there are three parties involved -- the local phone company, the long distance phone company, and the information provider. On the other hand, 976 number calls are local calls, so they only involve the local phone company and the information provider.

²⁵ See *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384 (1980) ("*Computer II*").

²⁶ See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion & Order, 84 FCC 2d 50 (1980).

²⁷ See *In the Matter of Detariffing of Billing and Collection Services*, Report and Order, 102 FCC 2d 1150 (1986) ("*Detariffing Order*").

dealings with information providers. Over the subsequent 15 years, many of the IXC and LECs who provided basic transmission service to information providers made use of this new authority by ceasing to provide billing and collection as part of their 900 service offerings.²⁸ Many information providers fought attempts by the phone companies to stop providing billing and collection service, to no avail.²⁹

There has never been a clear decision from the FCC or the courts as to the amount of discretion that IXCs and incumbent LECs had to serve or not serve information providers with basic transmission service.³⁰ Instead, the general regulatory structure, combined with industry convention that was reinforced by regulation, created an environment in which parties felt—rightly or wrongly—that the phone companies had a duty to deal. As a result, when some information providers began using pay-per-call

²⁸ See, e.g., Calvin Sims, *AT&T Seeks to Widen Services Offered by Businesses Over Phone*, N.Y. TIMES, Nov. 22, 1988, at A1 (“The phone company, however, has ways of discouraging such businesses. The phone company collects the charges for such calls and negotiates how much of that the business providing the service gets to keep. Mr. Lockhart said the phone companies have generally allowed a very slim return to pornographic services, and many of them have gone out of business.”); Lena Williams, *The Party Winds Down on Socializing by Phone*, N.Y. TIMES, Aug. 31, 1988, at A14, (“Bell Atlantic also notified long distance carriers for which it provides billing service that it would no longer bill customers for calls to 900 and 700 dial-it services with adult and party lines if they do not provide customers with a similar blocking option.”); Barnaby J. Feder, *Sprint Limits Some Billing On ‘900’ Calls*, N.Y. TIMES, Jul. 2, 1991, at D4.

²⁹ See, e.g., *Audio Communications, Inc. Petition for a Declaratory Ruling that the 900 Service Guidelines of US Sprint Communications Co. Violate Sections 201(a) and 202(a) of the Communications Act*, Memorandum Opinion & Order, 8 FCC Rcd 8697 ¶ 6 (1993) (“*Sprint 900 Billing Order*”).

³⁰ In at least one case, however, a court made passing mention of the issue. In 1984, Southern Bell Telephone Company refused to provide a 976 exchange number to Carlin Communications, a provider of various pay-per-call services, including “dial-a-porn.” See Stephen K. Doig, *Dial-A-Porn is Denied South Florida Callers Can’t Get Live Sex Talk*, MIAMI HERALD, Oct. 23, 1984, at D1. Carlin sued, and the case focused on whether Southern Bell was a ‘state actor’ subject to the requirements of the First Amendment because of the filed state tariff. See *Carlin Comm’n, Inc. v. Southern Bell Telephone Co.*, 802 F.2d 1352 (11th Cir. 1984) (“*Southern Bell*”). In its opinion, however, the court included a footnote to the effect that “Dial-It service is not part of Southern Bell’s function as a common carrier and therefore is not subject to the requirements regarding equal access that apply to telecommunications services offered by Southern Bell as a common carrier.” *Id.* at 1361 n.5. However, the court’s statement glosses over the central point of the *Computer II* decision which it cited and, in any event, is mere dicta.

services to distribute objectionable materials, or abused the service by engaging in deceptive or fraudulent practices, the carriers were unable to respond to consumer complaints in an effective manner.

b. Commission and Congressional Attempts to Regulate Problems Associated With Pay-Per-Call Services Were Constrained By The First Amendment and Other Considerations

Another unfortunate parallel between pay-per-call services and Short Code and text messaging services is that some individuals use the service in ways that other users find objectionable. Today, wireless carriers can respond to consumer complaints by denying service to those parties that abuse the service.³¹ In the case of pay-per-call services, however, the “basic” services offered by the IXCs and LECs were generally considered common carrier services. As a result, there was little the phone companies could do to address these complaints themselves, so Congress and the Commission had to step in.

There were two stages of government intervention. First, policy-makers focused on “dial-a-porn”— the use of pay-per-call services to transmit obscene or indecent materials over the telephone wires— and the accessibility of dial-a-porn to minors. Once policymakers finally found a constitutionally acceptable regime to limit minors’ ability to access these materials, they turned to the growing number of complaints regarding deceptive and outright fraudulent practices being perpetrated by information providers. In both cases, constraints on government action imposed by the First Amendment and

³¹ Verizon Wireless, for example, “said it blocks more than 200 million spam text messages every month.” Kim Hart, *Advertising Sent To Cellphones Opens New Front In War on Spam*, WASH. POST, March 10, 2008, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/09/AR2008030902213.html>.

other considerations curbed the ability of policymakers to address the issues being raised by consumers, thereby limiting the effectiveness of the laws and regulations ultimately adopted.

i. First Phase of Government Regulation – Dial-a-Porn

The porn industry was the first to really capitalize on the potential of pay-per-call services. According to one court, dial-a-porn accounted for 180,000,000 calls in the year ending in February 1984; in second place were calls for horse-race results, with 29,000,000 calls.³² Federal attempts to regulate dial-a-porn led to ten years' worth of legislating, adopting rules, litigation, more legislating, more rules, and more litigation. The results of these efforts are mixed, at best.

In the early 1980s, the growing prevalence of dial-a-porn led to calls to regulate the transmission of indecent and obscene content over the telephone networks. In 1982, Congressman Thomas Bliley of Virginia asked the Commission to adopt regulations to limit minors' ability to access obscene or indecent material.³³ The Commission initiated a proceeding to examine the question, but ultimately found that it did not have the requisite statutory authority.³⁴ Subsequently, in 1983 Congress amended Section 223 of the Act, making it illegal to send obscene or indecent communications to minors over telephone wires.³⁵

³² *Carlin Communications, Inc. v. FCC*, 787 F.2d 846, 848 (2d Cir 1986) (“*Carlin II*”).

³³ *See Carlin Communications, Inc. et al. v. FCC et al.*, 749 F.2d 113 (2d Cir. 1984) (“*Carlin I*”).

³⁴ *In the Matter of Application for Review of Complaint Filed by Peter F. Cohalan*, FCC File No. E-83-14, Memorandum Opinions and Orders Adopted May 13, 1983, and March 5, 1984.

³⁵ *Carlin I*, 749 F. 2d at 115-16.

The Commission almost immediately initiated a proceeding to adopt rules to implement the new Section 223. Numerous parties representing various sectors of the pay-per-call industry and other interest groups offered comments, and the Commission ultimately decided to adopt a “time-channeling” approach similar to that it adopted for broadcasters.³⁶ Under this approach, information providers offering obscene or indecent materials would have to limit the time that a caller could access these materials to certain hours of the day when, the Commission reasoned, minors would be less likely to be able to access these materials.³⁷ Information providers almost immediately sought judicial review of this decision.

In *Carlin v. FCC* (“*Carlin I*”), the Second Circuit Court of Appeals decided that the Commission’s decision to regulate dial-a-porn with “time channeling” did not withstand First Amendment scrutiny. The court concluded that the Commission’s approach was both overinclusive and underinclusive: overinclusive because adults would not be able to access the content at certain times of the day, and underinclusive because “enterprising minors” would still be able to access the content during those times when the content was available.³⁸ The court vacated the rules and remanded to the Commission. In so doing, the court did not examine the constitutionality of the statutory provision.³⁹

After this defeat, the Commission looked at alternative means for limiting minors’ access to these materials. In 1985, after notice and comment, the Commission adopted a rule that would require callers to either (a) provide the information provider with an

³⁶ *Id.* at 116-17.

³⁷ *Id.*

³⁸ *Id.* at 121-22.

³⁹ *Id.* at 123 (“In light of our holding, we need not address *Carlin*’s other constitutional challenges to the regulation or its challenges to the facial validity of section 223(b).”).

access code that would identify the caller as an adult, or (b) pay for the call by credit card before access is obtained.⁴⁰ On appeal, however, these rules were struck down as to those phone networks where the networks were incapable of providing the kind of two-way capability required to implement the access code requirement.⁴¹ The court in *Carlin II* reasoned that it was unconvinced that the access code requirement was the “least restrictive means for complying with the congressional mandate.”⁴²

In its Third Order, adopted in 1987, the Commission responded to the court’s conclusion in *Carlin II* by adopting another means for dial-a-porn purveyors to comply with the law.⁴³ The Commission said that, in addition to requiring an access code or credit card number, dial-a-porn providers could comply if they scrambled their messages such that only a person with an appropriate descrambling device would be able to receive an intelligible message.⁴⁴ The Second Circuit finally accepted these rules as constitutionally permissible. The court said that the rules “do not unreasonably restrict adults’ access” to indecent content, and that the “regulations are analogous to the requirements that sexually oriented materials be displayed behind blinder racks . . . or be

⁴⁰ See *Carlin II*, 787 F.2d at 853 (“The Commission concluded that the most effective means of restricting access by minors to dial-a-porn services while at the same time minimizing restrictions on the rights of adults was to require providers of such services either to send messages only to those adults who first obtain an access or identification code from the service provider or, alternatively, to require the caller to pay for the call by credit card before access is obtained.”).

⁴¹ *Id.* at 856 (“[T]his decision relates only to *Carlin* and the NYT system.”).

⁴² *Id.*

⁴³ See *Carlin Communications, Inc. et al. v. FCC*, 837 F.2d 546, 554-55 (2d Cir. 1988) (“*Carlin III*”).

⁴⁴ *Id.* at 554 (“The Commission also added scrambling as an available defense citing AT&T’s figures that scrambling devices cost between \$ 150 to \$ 2,500 and descrambling devices cost approximately \$ 15.”).

kept in sealed wrappers behind an opaque cover or in a separate adults-only section of the book store,” both of which had been upheld in other courts.⁴⁵

Now that the Commission had finally found a set of rules that passed Constitutional muster, the court also finally ruled on the constitutionality of the underlying statute. Carlin argued, among other things, that the statute was unconstitutionally vague because it did not define obscene or indecent.⁴⁶ The court disagreed, but held that the statute was only constitutional insofar as it was within the bounds of the Supreme Court’s obscenity jurisprudence, and, as a result, struck the words “or indecent” from the statute.⁴⁷

Despite this success, in 1988 Congress amended Section 223 to prohibit the transmission of obscene or indecent content over telephone wires to any individual, not just minors.⁴⁸ But, in *Sable Communications v. FCC*, the Supreme Court quickly struck down this law as overbroad.⁴⁹ In *Sable*, the Supreme Court concluded that the newly adopted provision did not survive constitutional scrutiny because the statute denied adults access to the content.⁵⁰ The Court noted that there was no evidence that less restrictive

⁴⁵ *Id.* at 557 (citations omitted).

⁴⁶ *Id.* at 558 (“Carlin argues that the statute is unconstitutionally defective in four ways: first, by its vagueness and overbreadth; second, because it violates due process; third, because it creates an impermissible national standard of obscenity; and fourth, because it constitutes an unconstitutional delegation of authority to the Commission.”).

⁴⁷ *Id.* at 560-61.

⁴⁸ *Sable Communications v. FCC*, 492 U.S. 115, 118 (1989) (“The 1988 amendments to the statute imposed a blanket prohibition on indecent as well as obscene interstate commercial telephone messages.”).

⁴⁹ *Id.* at 131 (“[I]t seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages.”).

⁵⁰ *Id.* at 126 (“Sexual expression which is indecent but not obscene is protected by the First Amendment; and the federal parties do not submit that the sale of such materials to adults could be criminalized solely because they are indecent.”).

methods were not effective, and referred to the statute as “another case of ‘burn[ing] up the house to roast the pig.’”⁵¹

After *Sable*, Congress amended Section 223 to again limit the delivery of such messages only as to minors.⁵² In 1990, the Commission followed with implementing regulations that adopted a “menu” of defenses that information providers could use, similar to the options that had been in place after the Third Order.⁵³ These rules were taken to court, and, in 1991, the Ninth Circuit Court of Appeals concluded that the statute and the rules promulgated thereunder were constitutionally permissible.⁵⁴

ii. Second Phase of Government Regulation -- Deceptive and Fraudulent Practices

As the litigation and rulemakings were on-going at the Commission and in the courts, it became clear to many policymakers that there were also problems outside the context of “dial-a-porn.” Consumers filed numerous complaints with the FCC,⁵⁵ the Federal Trade Commission (“FTC”),⁵⁶ and state attorneys-general⁵⁷ regarding fraudulent and deceptive practices, such as exorbitant charges, line seizing, failing to provide the

⁵¹ *Id.* at 131.

⁵² *See Information Providers’ Coalition for Defense of the First Amendment et al. v. FCC*, 928 F.2d 866, 868 (9th Cir. 1991) (“The 1989 Congressional action responded to the decision in [*Sable*], which held a prior version of the Act unconstitutionally overbroad.”).

⁵³ *Id.* at 873 (“On June 29, 1990, the FCC issued its Report and Order adopting regulations implementing section 223(b)[.]”).

⁵⁴ *Id.* at 879 (“We hold that the term “indecent” as used in section 223 of the Act and defined in the FCC rules is not void for vagueness, that the statute and the FCC’s implementing regulations are narrowly tailored to promote the compelling government interest of protecting the physical and psychological well-being of minors, that section 223 is not a prior restraint on speech, that substantial evidence supports the agency findings and that the FCC did not act arbitrarily or capriciously, abuse its discretion, or act otherwise not in accordance with the law in promulgating its rules.”).

⁵⁵ *900 Services NPRM* ¶ 5.

⁵⁶ *FTC Comments* at 9.

⁵⁷ *See, e.g.*, Comments of the Tennessee Attorney General, filed in CC. Dkt No. 91-65, at 2-5 (April 24, 1991) (reporting on the results of a survey to gauge consumer knowledge of the pay-per-call industry).

sought-after service, etc. As before, the carriers were unable to respond to these complaints, so the government had to step in.

Starting in 1991, the Commission and then Congress took steps to try to address these practices. That year, the Commission proposed and adopted a series of rules aimed at indirectly regulating the information provider.⁵⁸ Specifically, the Commission adopted a preamble requirement under which the information provider would have to clearly and understandably disclose its identity, a description of the information, product, or service that the caller will receive after the preamble (i.e., sports scores or stock quotes), and all per-call charges, and must inform the caller that he or she has an opportunity to disconnect the call before charges commence.⁵⁹ For offerings aimed at or likely to be of interest to children under the age of eighteen, the information provider was also required to include in the preamble a statement that the caller should hang up unless he or she has parental permission.⁶⁰ The Commission also required LECs to offer 900 call blocking to all its subscribers, including a one-time offer to block such calls for no charge,⁶¹ prohibited common carriers from disconnecting a subscribers' basic telephone service for failure to pay interstate pay-per-call service charges,⁶² prohibited the use of automated

⁵⁸ Because information providers were deemed to be providing enhanced services, the Commission did not directly regulate them, instead requiring that common carriers impose these obligations as part of the terms and conditions of offering the underlying transmission service. See *900 Services NPRM* ¶ 9.

⁵⁹ *In the Matter of Policies and Rules Concerning Interstate 900 Telecommunications Services*, Report and Order, 6 FCC Rcd 6166 ¶¶ 7, 22, 26, 30 (1991) (“*900 Services Order*”). Interestingly, by adopting requirements such as a preamble the rules had the effect of changing the end product. The Commission never considered this from a policy standpoint in adopting the rules.

⁶⁰ *Id.* ¶ 35.

⁶¹ *Id.* ¶¶ 46, 49.

⁶² *Id.* ¶ 64.

collect calls,⁶³ and line seizing,⁶⁴ and prohibited generation of broadcast tones that automatically dial a pay-per-call service.⁶⁵

One major consideration throughout the rulemaking process was that commercial speech is constitutionally protected.⁶⁶ Though these regulations were never really tested in court, the Commission, and, later, Congress, had to tailor any laws or regulations to ensure they did not run afoul of these protections.

The Supreme Court established the framework for analyzing the constitutionality of any law regulating commercial speech in *Central Hudson v. New York PSC*.⁶⁷ Under the *Central Hudson* rubric, restrictions on commercial speech must be analyzed under a four part test: (1) the speech must concern lawful activity and not be misleading; (2) the asserted governmental interest must be substantial; (3) the regulation must directly and materially advance the governmental interest; and (4) the regulation must be no more extensive than necessary to serve that interest.⁶⁸ For whatever reason, however, the Commission did not use this analytical framework to determine whether its regulations satisfied constitutional requirements.

Instead, the FCC examined its proposed rules under *Zauderer v. Office of Disciplinary Counsel*, a case regarding the states' ability to regulate advertising for

⁶³ *Id.* ¶ 70.

⁶⁴ *Id.* ¶ 73

⁶⁵ *Id.* ¶ 79.

⁶⁶ *See, e.g., 900 Services Order* ¶ 8-12.

⁶⁷ *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

⁶⁸ *Id.* at 566 (“In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”)

attorneys.⁶⁹ The Commission argued that *Zauderer* stands for the proposition that an advertiser's First Amendment rights are adequately protected so long as the disclosure requirement is reasonably related to the state's interest in preventing consumer deception.⁷⁰ According to the Commission, the requirements imposed on information providers fell within that category.⁷¹ The Commission rejected arguments that the situation was more closely analogous to *Riley v. National Federation for the Blind of North Carolina*,⁷² arguing that *Riley* involved commercial speech that was "inextricably intertwined" with non-commercial speech, whereas the speech at issue in the pay-per-call rules is solely commercial speech.⁷³

Shortly after the Commission adopted its rules, Congress passed the Telephone Disclosure and Dispute Resolution Act ("TDDRA") to further expand and provide explicit statutory authority for the FCC's regulation of the pay-per-call industry.⁷⁴ The TDDRA created Section 228, and directed the FCC and the FTC to provide "for the regulation and oversight of the applications and growth of the pay-per-call industry."⁷⁵ Generally, the TDDRA mandated many of the same requirements that had been recently adopted by the Commission -- a preamble to disclose relevant information, a prohibition on disconnect basic telephone service for failure to pay a 900 service charge, and

⁶⁹ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

⁷⁰ *See 900 Services Order* ¶¶ 8-12.

⁷¹ *Id.*

⁷² *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988).

⁷³ *900 Services Order* ¶ 10.

⁷⁴ *See Telephone Disclosure and Dispute Resolution Act*, Pub. L. No. 102-556 ("TDDRA"). *See also In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, Notice of Proposed Rulemaking and Notice of Inquiry, 8 FCC Rcd 2331 (1993) ("*TDDRA Notice*").

⁷⁵ TDDRA preamble.

blocking on request.⁷⁶ In addition, the TDDRA adopted an explicit definition of pay-per-call services, mandated that all services meeting the definition of pay-per-call services be offered using numbers designated by the FCC, and directed the FCC to establish rules that would constrain the ability of pay-per-call providers to use 800 numbers or other numbers “advertised or widely understood to be toll free.”⁷⁷ At the same time, however, the TDDRA directed the FCC to adopt regulations that would protect common carriers and 900 service providers “against nonpayment of legitimate charges.”⁷⁸ The FCC adopted the requirements of the TDDRA almost verbatim.⁷⁹

The adoption of these rules and requirements did little to stem the tide of consumer complaints. A little over a year after adopting the mandates of the TDDRA, the Commission issued a Further Notice of Proposed Rulemaking (“*Further Notice*”) because of a high number of complaints that pay-per-call providers were abusing the Commission’s rules for presubscription agreements.⁸⁰ Congress, for its part, in the Telecommunications Act of 1996, amended Section 228 to impose new requirements on pay-per-call services. As with the Commission’s proposals in the *Further Notice*, the amendments were intended to reduce the ability of pay-per-call services to evade the existing regulations.⁸¹ For example, the amended provisions expanded the protection for

⁷⁶ See, e.g., *TDDRA Notice* ¶ 10.

⁷⁷ Id. ¶ 29 (citing 47 U.S.C. § 228(c)(7)).

⁷⁸ Id. ¶ 40 (citing 47 U.S.C. § 228(b)(4)).

⁷⁹ See *In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, Report and Order, 8 FCC Rcd 6885 (1993).

⁸⁰ See *In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, Order on Reconsideration and Further Notice of Proposed Rulemaking, 9 FCC Rcd 6891 (1994).

⁸¹ See *In the Matter of Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996; In the Matter of Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 14738 (1996).

consumers who called 800 or other toll-free numbers. As before, the FCC adopted these changes virtually verbatim.⁸²

Unfortunately, even those measures have not stemmed the tide of consumer complaints. Whereas the FCC reported 2000 consumer complaints over the course of two years in the late 1980s,⁸³ in only the first six months of 2004 the FCC reportedly received close to 5,000 complaints referencing toll-free numbers.⁸⁴ In 2003 the FCC sought to refresh the record in its pay-per-call rulemaking,⁸⁵ and in 2004 opened an entirely new proceeding to determine what steps it could take to further protect consumers from these practices.⁸⁶ One proposal -- to expand the definition of pay-per-call services, thereby expanding the number of services that would have to use 900 numbers under the requirements of the TDDRA -- invited vocal opposition. Several information providers argued that Sprint and AT&T were no longer offering any 900 service, and that the FCC's proposal would force information providers to use a service that nobody was selling.⁸⁷ As of March 14, 2008, this rulemaking is still pending.

⁸² *Id.*

⁸³ *900 Services NPRM* ¶ 5.

⁸⁴ *See Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996; Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services, and Toll-free Number Usage; Truth-in-Billing and Billing Format; Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Florida Public Service Commission Petition to Initiate Rulemaking to Adopt Additional Safeguards; Application for Review of Advisory Ruling Regarding Directly Dialed Calls to International Information Services*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 19 FCC Rcd 13461 (2004).

⁸⁵ Public Notice, *The Consumer & Governmental Affairs Bureau Seeks Comment to Refresh the Record on the Commission's Rules Governing Interstate Pay-Per-Call & Other Information Services*, 18 FCC Rcd 4942 (2003).

⁸⁶ *In the Matter of Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996, Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services, and Toll-free Number Usage, etc.*, Notice of Proposed Rulemaking and Mem. Op. & Order, 19 FCC Rcd 13461 (2004).

⁸⁷ *See, e.g.*, Comments of LO-AD Communications, filed in CC Dkt No. 96-146, at 17 (filed May 12, 2003) ("When Congress initially passed this bill, AT&T, Sprint, and MCI all

2. Recent Indecency and Commercial Speech Decisions Reinforce Constraints of Government Action and Confirm The Wisdom of Carrier Protection of Consumer Interests

Recent court decisions on a variety of high-profile issues highlight the fact that the Commission and Congress remain constrained in their ability to act to address practices that fall under the protection of the First Amendment.

Most notably, the Commission's attempts to regulate broadcast indecency were dealt a significant blow by the Second Circuit Court of Appeals, which reversed the FCC's decision to impose significant forfeitures on broadcasters for "fleeting profanities."⁸⁸ The court's reversal was based primarily on an "arbitrary and capricious" rationale, but discussed at length the constitutional limitations on the Commission's ability to regulate indecent content.⁸⁹ For example, the court "question[ed] whether the FCC's indecency test can survive First Amendment scrutiny," concluding that the test is "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague."⁹⁰ Tellingly, this was in the context of broadcasting, over which the FCC has been afforded more flexibility in the First Amendment context, because of broadcasting's "unique" attributes.⁹¹

Commercial speech questions have arisen in litigation over a number of FCC rulemakings and similar contexts. In the case of the Commission's rules protecting customer proprietary network information ("CPNI"), courts and the Commission have

offered 900 services. AT&T is now in the process of withdrawing its product, and MCI and Sprint will no longer sign up new customers").

⁸⁸ *Fox Television Stations, Inc. et al. v. FCC*, 489 F.3d 444 (2d Cir. 2007).

⁸⁹ *Id.* at 462.

⁹⁰ *Id.*

⁹¹ *See FCC v. Pacifica Foundation et al.*, 438 US 726 (1978)

struggled with the constitutional implications.⁹² In *U.S. West*, the court explained that “[w]hen faced with a constitutional challenge, the government bears the responsibility of building a record adequate to clearly articulate and justify the state interest,”⁹³ and noted its doubts about whether the state’s interest in maintaining citizens’ privacy “rises to the level of [a] ‘substantial’” interest.⁹⁴ This level of scrutiny has also been present in the context of the FCC’s and FTC’s Do-Not-Call list.⁹⁵ Even though the Tenth Circuit Court of Appeals eventually found that the rules survived constitutional scrutiny, it did not do so lightly, noting that “[t]he government bears the burden of asserting one of more substantial governmental interests and demonstrating a reasonable fit between those interests and the challenged regulation.”⁹⁶

As each of these cases makes clear, the First Amendment continues to play a critical role in constraining the ability of government to take steps that effectively and quickly address consumer concerns regarding the distribution of indecent materials, or allegations of deceptive or fraudulent practices.

The primary lesson to be drawn from the experience with pay-per-call services is that, due to existing regulatory structures constraining carriers’ ability to engage in self-help, and marketplace factors that gave policy-makers pause about allowing carriers to engage in self-help, the government had to step in and regulate pay-per-call services when socially objectionable materials and deceptive/fraudulent practices became prevalent. The government’s ability to do this was constrained by the First Amendment and other factors; as a result, the outcome of the regulation was mixed, at best.

⁹² See, e.g., *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (1999).

⁹³ *Id.* at 1234.

⁹⁴ *Id.* at 1235.

⁹⁵ See, e.g., *Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004).

⁹⁶ *Id.* at 1237.

Carriers, by contrast, are not constrained by the First Amendment in their ability to protect customers from fraud and objectionable material. This facet of private actors' abilities has not been lost on policymakers at both the state and federal level. For example, in 2005, then Wireless Telecommunications Bureau Chief John Muleta wrote to CTIA President and CEO Steve Largent asking the industry to publicize "what is being done by industry to prevent access to adult content by minors[.]"⁹⁷

More recently, the State of Florida has taken an active interest in seeing wireless carriers protect consumers from fraudulent practices. In February, AT&T Mobility entered into an agreement with the Attorney General of Florida whereby AT&T will "police representations made in internet advertising for cell phone content to ensure fair and full disclosure."⁹⁸ A Commission grant of the Petitioner's requests would eviscerate carriers' abilities to provide customers with these protections. It means nothing if carriers point out that a company is committing a fraud on customers, but is forced to provide them with the means to perpetrate the fraud.

To that end, the FCC should similarly reject Petitioners' calls to require the non-discriminatory provision of Short Codes pursuant to Title I.⁹⁹ Short Codes, like 900 service billing and collection, are not a common carrier service and, with respect to that service, carriers have and should have the right to choose with whom to deal. Just like the Sprint Telemedia context, carriers are lending their name and reputation to marketers wishing to use a Common Short Code. Accordingly, they should be given the same

⁹⁷ Letter from John Muleta, Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Steve Largent, President and CEO, CTIA – The Wireless Association®, dated Feb. 15, 2005.

⁹⁸ News Release, "McCollum Retrieves Millions For Florida AT&T Wireless Customers Billed for 'Free' Ringtones," Office of the Attorney General of Florida (Feb. 29, 2008).

⁹⁹ Petition at 19-24

latitude afforded to Sprint. And, as with billing and collection functions, competitive alternatives abound for dissemination of messages or advertising. These include not only traditional media but also the Internet and the continued use of SMS messaging itself. The Commission should heed the lessons that were learned in the 900 number context and continue to allow carriers to operate in the competitive marketplace to provide customers with the service and protections they demand. The refusal to recognize a Short Code in no way eliminates the ability to use SMS messaging and provides consumers with the protections that they – and the government – demand from telecommunications providers.

III. AS A MATTER OF LAW, PETITIONERS ARE INCORRECT THAT SMS AND SHORT CODES ARE COMMERCIAL MOBILE RADIO SERVICES

The Petitioners contend that SMS is a commercial mobile radio service because it is interconnected with the PSTN.¹⁰⁰ This contention reflects a fundamental misunderstanding of the nature of SMS, which, unlike traditional mobile voice service, is not an interconnected service under the FCC’s rules. Petitioners further argue that SMS is not an information service because it is not a broadband Internet access service and makes no use of the Internet.¹⁰¹ Information services, however, are not limited to Internet access services.

Prior to the MFJ, the Commission’s own *Computer II* ruling established a similar distinction between enhanced services and basic services. Enhanced services are services that “employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber

¹⁰⁰ Petition at 8-12.

¹⁰¹ Petition at 10-11.

interaction with stored information.”¹⁰² The FCC has found that all of the services that the Commission has previously considered to be enhanced services are information services.¹⁰³

Applying these definitions, the MFJ Court and the FCC consistently have classified store-and-forward messaging services like voice mail and email as information services.¹⁰⁴ In the *Stevens Report*, the FCC explained in detail why email is an information service, not a telecommunications service like a facsimile:

[E]lectronic mail utilizes data storage as a key feature of the service offering. The fact that an electronic mail message is stored on an Internet provider’s computers in digital form offers the subscriber extensive capabilities for manipulation of the underlying data. The process begins when a sender uses a software interface to generate an electronic mail message (potentially including files in text, graphics, video or audio formats.) The sender’s Internet service does not send that message directly to the recipient. Rather, it conveys it to a ‘mail server’ computer owned by the recipient’s Internet service provider, which stores the message until the recipient chooses to access it.¹⁰⁵

Petitioners’ suggestion to the contrary notwithstanding, SMS falls squarely within the category of services that the FCC and the Courts have consistently found to be information services.

A. SMS Is an Information Service

SMS bears all the hallmarks of services, like email and voice storage and retrieval, that have long been classified as enhanced or information services under the

¹⁰² 47 C.F.R. § 64.702(a).

¹⁰³ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, ¶ 102 (1996) (subsequent history omitted) (“*1996 Non-Accounting Safeguards Order*”).

¹⁰⁴ *See, e.g., Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 75 & n.148 (1998) (“*1998 Stevens Report*”) (“Electronic mail, like other store-and-forward services, including voice mail was classified [under the MFJ] as an information service. Moreover, the Commission has consistently classed such services as ‘enhanced services’ under *Computer II*.”) (citations omitted).

¹⁰⁵ *Stevens Report*, ¶ 78.

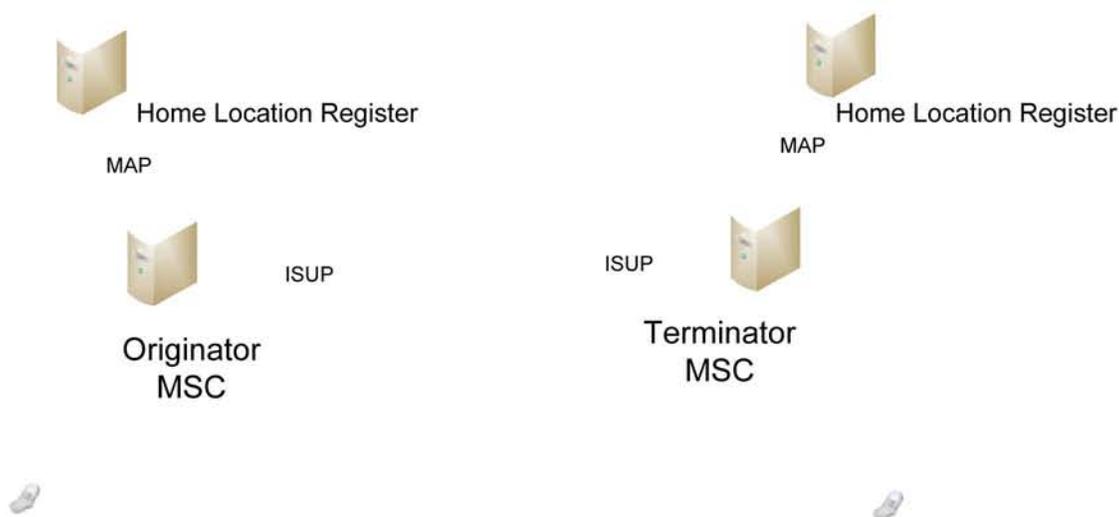
Modification of Final Judgment (“MFJ”),¹⁰⁶ the Commission’s *Computer Inquiry* regime,¹⁰⁷ and the Communications Act of 1934, as amended (“Act”). Like these services, SMS involves the storage and forwarding of messages, data conversion and data retrieval functions. SMS is fundamentally different than mobile voice calls. The Petitioners’ suggestion that the two are virtually the same and should be subject to similar regulation fails to take into account the inherent technical and practical differences between SMS and mobile voice service.

When a mobile phone subscriber makes an ordinary voice call, the call is transmitted over wireless spectrum to a mobile base station or a cell site where it is transferred to a dedicated circuit that delivers the call to a mobile switching center (“MSC”). The MSC queries the Home Location Register (“HLR”), which stores location information for the wireless device being called. If the call is going to another mobile phone, the MSC determines the appropriate terminating MSC, whether on that carrier’s network or that of another wireless carrier, and routes the call accordingly. If the call is going to a landline phone, the MSC sends the call for termination on the appropriate landline network. In either event, an end-to-end circuit is established over the PSTN between either the originating and terminating MSCs or the MSC and a landline network switch. The following diagram show the routing for a mobile voice call.

¹⁰⁶ *U.S. v. Western Electric Co., Inc.*, 552 F. Supp. 131 (D.D.C. 1982) (subsequent history omitted).

¹⁰⁷ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Computer II)*, 77 FCC 2d 384 (1980) (“*Computer II*”) (subsequent and prior history omitted).

Basic Voice Call Routing



SMS is fundamentally different than a voice call. SMS messages are not exchanged directly between the originator and recipient over an open circuit. Nor are they routed over the PSTN – or subject to the interconnection requirements of Title II of the Act. Instead, SMS messages are *always* routed through what is known as a short message service center (“SMSC”). The SMSC houses computers that store, process and transform SMS messages. One of the SMSC’s primary functions is to store the message until the recipient’s device is ready to receive it.¹⁰⁸ Once the SMSC receives a signal that the receiving device is ready to accept the message, the SMSC retrieves it and forwards it on. The SMSC thus performs a store and forward function, similar to an email server.

Store and forward services like SMS have consistently been treated as information services or enhanced services, not telecommunications services. The

¹⁰⁸ The SMSC also determines where to route the SMS message and provides message delivery status reports.

Communications Act defines an information service as a service that provides the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”¹⁰⁹ This definition is virtually identical to the definition of an information service in the 1984 consent decree resolving the government’s antitrust case against AT&T.¹¹⁰ The Act distinguishes information services, which are unregulated, from telecommunications services, which are subject to Title II regulation.¹¹¹

As described above, SMS fits squarely within the definition and precedent that determine an information service. *First*, just as with email, SMS messages are not sent directly to the recipient, but rather to computers, housed in the SMSC, that store the data until it is ready to be received. SMS thus uses data storage “as a key feature of the service offering.” SMS is also similar to telemessaging services (such as voice mail and voice storage and retrieval services) that have been classified as information services.¹¹² Voice storage services are optional features that allow subscribers to store, retrieve, and send messages.¹¹³ By storing SMS messages until they are ready to be received, SMS likewise provides consumers with this functionality.

¹⁰⁹ 47 U.S.C. § 153(20).

¹¹⁰ *U.S. v. Western Electric Co., Inc.*, 552 F. Supp. 131, 179 (D.D.C. 1982) (“Modification of Final Judgment” or “MFJ”) (subsequent history omitted).

¹¹¹ The Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). In turn, the Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46).

¹¹² *1996 Safeguards Accounting Order* ¶ 145.

¹¹³ *U.S. v. Western Electric Co, Inc.*, 627 F. Supp. 1090, n.89 (D.D.C. 1986) (subsequent history omitted).

Second, SMS offers the capability for “subscriber interaction with stored information,” another hallmark of information services.¹¹⁴ A wireless subscriber may ask for and receive content, such as weather, sports or stock information, from a third party that has stored that information on its servers. SMS subscribers can “pull” this information from the servers by making specific requests, or they can signal their intent to have such information regularly “pushed” to their mobile phone by the application provider.

Third, computers act on the form and content of an SMS message. For example, different wireless technologies can accommodate different sized text messages. GSM-based systems can accept messages up to 160 characters whereas CDMA systems are designed to accept messages up to 143 characters. When a GSM-based subscriber sends a 160 character message to a CDMA-based subscriber, computers must reformat the message and break it up into two separate messages. Carriers may also insert additional information into the message, such as call-back numbers and dates. Carriers, using third-party application providers, are also just beginning to offer the capability to send text messages from mobile to landline phones. To the extent that this occurs, which is minimal today, the message must be transformed from text to speech, a quintessential information service. Additionally, subscribers can set a time limit on how long the SMSC should attempt to deliver the message. If the text message only has immediate relevance, the subscriber can direct the SMSC to erase the message within a short period if it is not forwarded within that time. Most networks also set a time limit on how long the message will be stored, typically several days, before it is erased. Because SMS

¹¹⁴ *Computer II* ¶ 97; see also *U.S. v. Western Electric Co.*, 1998 U.S. Dist. LEXIS 13536 (D.D.C. 1998) (finding time and weather information announcements to be information services) (subsequent history omitted).

messages undergo “a change in the form or content of the information as sent and received,” they are an information service.

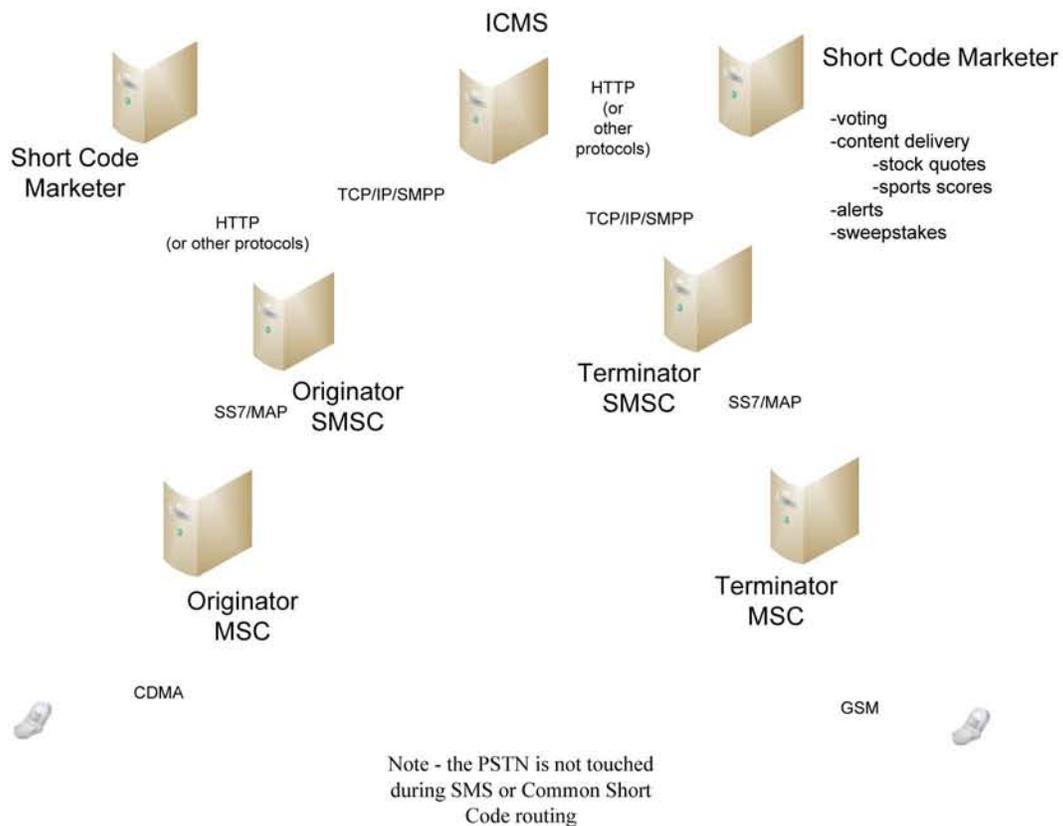
Finally, SMS messages routinely involve “address translation, protocol conversion [and] billing management,” which are also characteristics of information services.¹¹⁵ A net protocol conversion occurs when “an end-user [can] send information into a network in one protocol and have it exit the network in a different protocol.”¹¹⁶ That conversion “transforms” information, and therefore provides an information service.¹¹⁷ SMS messages undergo net protocol conversions when the sender and receiver are on different wireless networks that utilize different technologies (*e.g.*, GSM and CDMA) or if the SMS message originates or terminates on an Internet or IP connected computer or third-party application provider’s server. Such messages are often routed through a third-party inter-carrier messaging service (“ICMS”). Examples of such routing and conversion are depicted in the following diagram.

¹¹⁵ *Stevens Report*, ¶75.

¹¹⁶ *1996 Non-Accounting Safeguards Order* ¶ 104.

¹¹⁷ *1996 Non-Accounting Safeguards Order* ¶¶ 105-06; *see also National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 977 (2005) (defining “protocol conversion” as “the ability to communicate between networks that employ different data-transmission formats”).

Routing for Inter-Carrier SMS Messages or to Short Code Marketers



In sum, SMS exhibits the hallmarks of an information service. It offers the capability for “storing, transforming, processing, [and] retrieving” information. It also falls within the definition of enhanced services because it “involve[s] subscriber interaction with stored information” and “employ[s] computer processing applications that act on the format . . . code [and] protocol of the subscriber’s transmitted information.”

There is no merit to Petitioners’ arguments that SMS cannot be an information service because it “simply relay[s] the user’s communication from one place to another, without changing the form or content of the communications.”¹¹⁸ As noted above, the

¹¹⁸ Petition at 11.

form and content of SMS messages is often changed. But even if this were not the case, a change in content is not determinative of information service classification – email content is not changed. A service is not removed from the information service classification if the provider only plays a role in the exchange of information (such as facilitating peer-to-peer communication).¹¹⁹ Indeed, under the MFJ, information services included not only services in which the telephone company controlled the content but also “services which would involve no control [by the service provider] over the content of the information other than for transmission purposes.”¹²⁰ These services are considered information services because voice or data storage was a feature of service offering rather than simply an inherent aspect of the technology used in transmission or switching.¹²¹

Petitioners’ primary argument that SMS is not an information service is based on the misguided contention that information services are limited to broadband Internet access services or services that use the Internet.¹²² Information services are not limited to broadband Internet access or Internet-based services. Numerous services that have been deemed to be information services have no broadband or Internet components, and the classification of services as information or enhanced was developed long before broadband or Internet applications. The existence of new technologies does not eviscerate the Commission’s long-standing precedent that a service blending

¹¹⁹ *Petition for Declaratory Ruling that pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307, ¶ 12 (2004).

¹²⁰ *U.S. v. Western Electric Co., Inc.*, 552 F. Supp. 131, 179 (D.D.C. 1982).

¹²¹ See U.S. Department of Justice, Response to Public Comments on Proposed Modification of Final Judgment, 47 Fed. Reg. 23320, 23334 (May 27, 1982); U.S. Department of Justice, Competitive Impact Statement in Connection With Proposed Modification of Final Judgment, 47 Fed. Reg. 7170, 7176 (Feb. 17, 1982).

¹²² Petition at 11.

communications with computer processing and enhanced capabilities is properly classified as an information service.¹²³

B. SMS Is Not a Commercial Mobile Radio Service

Petitioners incorrectly claim that SMS must be subject to common carrier regulation because it is a commercial mobile radio service.¹²⁴ A commercial mobile radio service is one that is an “interconnected service” meaning that it “is interconnected with the public switched network . . . [and] gives subscribers the capability to communicate or receive messages from all other users on the public switched network.”¹²⁵ A person that provides commercial mobile service “shall . . . be treated as a common carrier.”¹²⁶ SMS does not fit within this definitional structure and thus is not CMRS. Even if SMS were considered an “interconnected service,” which it is not, it is not a common carrier offering, as demonstrated above, and the Commission’s recent analysis in the *Wireless Broadband Order*¹²⁷ dictates that it not be treated as CMRS.

1. SMS Is Not an “Interconnected Service”

Petitioners argue that the Commission should “clarify” that SMS should be subject to “all common carrier regulations” because it is an interconnected service and

¹²³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, ¶ 13 (2002) (“[B]roadband offerings may differ in form and scope from previous information services. The Commission has viewed information services such as voice mail, telemessaging, or credit card validation to be an incremental extension of the existing narrowband telecommunications network. It has described information services as using the ‘existing telephone network to deliver services that provide more than a basic transmission offering,’ or as ‘enhancements that build upon basic services.’ Today, however, the capabilities made possible by broadband capable facilities enable the deployment of new, bandwidth-intensive, multimedia information services, which in turn drive the use and further deployment of broadband capable facilities.”).

¹²⁴ Petition at 7-8.

¹²⁵ 47 U.S.C. §§ 332(d)(1), (d)(2); 47 C.F.R. § 20.3.

¹²⁶ 47 U.S.C. § 332(c)(1)(A).

¹²⁷ *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901 (2007) (“*Wireless Broadband Order*”).

thus meets the requirements for classification as CMRS.¹²⁸ Petitioners predicate this argument on several false premises. They incorrectly claim that the Commission found that SMS was an interconnected service in the *Roaming Reexamination Order*, and thus effectively determined it was CMRS.¹²⁹ The Commission specifically did not say that. They also argue that SMS should be classified as CMRS because it uses the North American Numbering Plan, is interconnected with the PSTN, and gives users the ability to communicate with others on the network.¹³⁰ Finally, they make vague and confusing arguments regarding the interrelated nature of SMS text messaging and mobile voice services, none of which support a CMRS classification. None of these arguments has merit.

First, the Commission made no finding regarding the classification of SMS in the *Roaming Reexamination Order*. Rather, the Commission specifically stated that “nothing in this order should be construed as addressing [the] regulatory classification of push-to-talk, SMS or other data features/services.”¹³¹ Moreover, contrary to Petitioners’ claims, the Commission made no finding that SMS was an interconnected service. The Commission’s decision to impose roaming obligations on SMS was based on its finding that SMS is bundled with “other CMRS services, such as real-time, two-way switched mobile voice or data, that are interconnected with the public switched network,” and that consumers expect seamless connectivity of SMS just like voice services.¹³² The FCC undertook no analysis of whether SMS is an interconnected service, nor did it cite a

¹²⁸ Petition at 7. Petitioners implicitly make the same claim regarding CSCs, which is discussed below.

¹²⁹ Petition at 8-9.

¹³⁰ Petition at 9.

¹³¹ *Roaming Reexamination Order* at n.134.

¹³² *Id.* ¶ 56.

single comment to suggest that it was. Petitioners' claim that the *Roaming Reexamination Order* somehow compels a finding that SMS is a commercial mobile radio service lacks any support.

Second, SMS is not interconnected to the public switched network and does not “give[] subscribers the capability to communicate or receive communication *from all other users on the public switched network*.”¹³³ As described above, SMS messages are not transmitted on the PSTN, as are CMRS voice services. Nor does SMS offer the capability to communicate with all users of the public switched network. SMS text messaging occurs overwhelmingly between mobile phones. And while Petitioners point out that SMS messages can be sent or received by computers or an advertiser or marketer's servers, such interactions do not implicate the PSTN. Rather, they involve connections between wireless networks and the Internet or IP-based networks, to which the computers and servers are connected.

Petitioners attempt to make much of the fact that some wireless carriers are beginning to offer the ability to send SMS text messages to landline phones. Petitioners concede, however, that such exchanges, which represent an insignificant portion of SMS text messages, can only occur through additional computer processing.¹³⁴ This additional processing typically is performed by another third party application provider that transforms the text message into speech which is then read by a computer to the called party. This interaction between mobile and landline phones thus requires a quintessential information service.¹³⁵

¹³³ 47 C.F.R. § 20.3 (defining CMRS).

¹³⁴ Petition at 9-10.

¹³⁵ 47 U.S.C. § 153(20) (information service involves the capability of “transforming” or “processing” information).

Third, Petitioners also raise vague arguments that text messages are “intertwined with voice services” and thus should be regulated in the same way.¹³⁶ The examples given, however, provide no grounds for this claim. The examples merely demonstrate ways in which SMS text messaging can be used to access phone numbers or can facilitate setting up a voice call. It is unclear why such SMS applications should lead to regulation of text messages as if they were in fact voice calls.¹³⁷ As noted above, the two are offered in fundamentally different ways.

2. The FCC’s Analysis in the *Wireless Broadband Order* Precludes Treating SMS as a Commercial Mobile Service, Even If It Were an Interconnected Service

The Commission concluded in the *Wireless Broadband Order* that treating an information service as CMRS, even if it were an interconnected service, creates an internal contradiction in the statutory framework that is best resolved by rejecting CMRS status.¹³⁸ The exact same reasoning applies to SMS, which, as explained above, is an information service.

As the Commission has explained, the statutory contradiction occurs where the wireless carrier provides both an information service and a service that unquestionably is CMRS, such as traditional mobile voice service.¹³⁹ The service provider thus qualifies as a telecommunications carrier, but, under the Act’s definition, only to the extent it is

¹³⁶ Petition at 13. Petitioners do not explain how voice and SMS services are intertwined, except that they both are available on a single mobile handset. The two are designed, however, to operate independently. One of the attractive features of SMS is that a handset can be used to make a voice call and, at the same time, send or receive text messages. This demonstrates that the two traverse the network differently. Voice calls are transmitted over open circuits whereas SMS is transmitted over the SS7 packet network (typically used for out-of-band call set-up and transport of signaling information) and over the Internet or managed IP networks.

¹³⁷ It would be ironic if market driven innovations such as reading text messages to landline phone subscribers became the basis of regulating SMS. Not only would such a result chill further innovations, but it will drive carriers to eliminate this feature.

¹³⁸ *Wireless Broadband Order* ¶ 48.

¹³⁹ *Id.* ¶ 49.

providing a telecommunications service.¹⁴⁰ Under section 3 of the Act, a wireless carrier is treated as a common carrier for the telecommunications service it provides, *e.g.*, traditional mobile voice service, “but it cannot be treated as a common carrier with respect to” information services it provides, *e.g.*, SMS. At the same time, if the information service is an “interconnected service” and thus CMRS, the information service would be treated as a common carrier service under section 332 of the Act. This creates an inherent contradiction with section 3 of the Act, which prohibits common carrier regulation of information services. The Commission found no basis for giving more weight to one statutory provision over the other. It thus concluded that the information service there, wireless broadband, is not included in the commercial mobile service definition.¹⁴¹

The Commission’s reasoning compels the same result here. Treating SMS, an information service, as CMRS would elevate section 332 over section 3. It would result in applying common carrier regulation to a non-telecommunications service, in violation of section 3. Moreover, the Commission found that construing the CMRS definition to exclude information services “is consistent with and furthers the Act’s overall intent to allow information services to develop free of common carrier regulations.”¹⁴² As will be further discussed below, the lack of common carrier regulation over SMS to date has sparked tremendous innovation that would only be chilled through application of Title II.

¹⁴⁰ *Id.* ¶ 50 (citing 47 U.S.C. § 153(44)).

¹⁴¹ *Id.* ¶¶ 51-52.

¹⁴² *Id.* ¶ 54.

C. Common Short Codes Are Not CMRS; They Are An Information and Billing Service

Despite Petitioner's claims to the contrary, Short Codes are not CMRS. As simple addresses, Short Codes utilize SMS to transport the message to the intended recipient. Even more fundamentally, Short Codes are simply a billing and marketing tool. A wireless subscriber cannot reach another mobile phone, let alone a landline phone connected to the PSTN, by entering a Short Code. Short Codes are simply a number sequence offered to third party marketers. In sum, Short Codes are not telecommunications services, nor are they CMRS. Short Code messages never touch the PSTN – they are transported between wireless carriers' networks and a data application that resides on the Internet or a private IP-based network. To the extent that Short Codes are a service at all, their service classification should be the same as SMS – an information service.

As explained above, Short Codes are a mobile address, just like a domain name is an Internet address. Short Codes have become a powerful marketing tool utilized by a variety of commercial and non-commercial entities seeking to market something. Neustar operates the Short Code registry pursuant to a contract with the Common Short Code Administrator (“CSCA”), CTIA - The Wireless Association[®]. Neither the NANPA nor wireless carriers assign Short Codes. Once a Short Code is obtained from the CSCA, the holder of the short code submits information regarding its marketing plan to each individual wireless carrier that it wants to recognize the code. The wireless industry and the Mobile Marketing Association have developed best practices to which wireless

carriers refer in determining whether to accept the proposed Short Code marketing campaign.¹⁴³

The marketing entities advertise their Short Codes through various media, such as television, radio or print. Since Short Codes are leased by companies, not individuals, by sending a text message to the Short Code holder, a wireless subscriber establishes a relationship that allows the mobile marketer to send whatever is being marketed from the third party provider to the wireless subscriber. Popular applications for Short Codes include: (1) participating in a favorite program by voting for contestants; (2) entering a sweepstakes by sending a text to a Short Code; (3) obtaining product information in response to an advertised Short Code; (4) pulling information from online databases; or (5) having information or alerts, such as sports scores, stock information or meeting events “pushed” to subscribers that have indicated their desire for such information by sending a text message to a Short Code.

Short Codes bear absolutely no resemblance to voice services. Because Short Codes are simply an address for a text message, as with SMS messages generally, Short Codes are routed over an the carriers’ packet network to the SMSC, which identifies the destination associated with the code and routes the message accordingly. Unlike a typical SMS, however, this message is delivered to an advertiser’s or marketer’s server, not another person. The SMSC routes the message either directly to the third party application provider assigned the Short Code, or to an intermediary that in turn forwards

¹⁴³ See Laura Marriott, *Short Codes and Text Messaging: Easy-to-Use, Relevant and Entertaining*, RCR Wireless News (Nov. 13, 2007) (attached at Appendix A); see also MOBILE MARKETING ASSOCIATION, COMMON SHORT CODE PRIMER (2006) (attached at Appendix A); CTIA – The Wireless Association®, Wireless Content Guidelines, available at <http://www.ctia.org/content/index.cfm/AID/10394>.

the message to the third party application provider. Routing for Short Codes is depicted in the diagram above on page 38.

The application provider's server acts on the message (*e.g.*, counts a vote or retrieves information to be delivered to the mobile subscriber) and sends a response back to the SMSC, which in turn converts the message from IP to the appropriate wireless technology (*e.g.*, CDMA or GSM) so that it can be delivered to the subscriber's handset. Because Short Codes use SMS as the underlying messaging technology, they also require a net protocol conversion from the wireless network's protocol to SMPP. For the same reasons as SMS, Short Codes qualify as an information service under long-standing precedent.¹⁴⁴

Short Codes are not CMRS because the messages they support are not an interconnected service under the Commission's rules. Short Codes do not "give[] subscribers the capability to communicate or receive communication *from all other users on the public switched network.*"¹⁴⁵ Short Codes may only be used to send a specified text message to the third party marketer that has leased the code. Short Codes do not use the North American Numbering Plan because they are not telephone numbers.

There is thus no basis under Title II or Title III to require carriers to load Short Codes on their networks in compliance with common carrier, non-discrimination obligations as demanded by Petitioners. Short Codes currently are not offered indiscriminately, nor would it serve the public interest to require wireless carriers to support every Short Code application. Additionally, carriers often perform a billing and

¹⁴⁴ 1996 Non-Accounting Safeguards Order ¶¶ 104-06; see also *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 977 (2005) (defining "protocol conversion" as "the ability to communicate between networks that employ different data-transmission formats").

¹⁴⁵ 47 C.F.R. § 20.3 (defining CMRS) (emphasis added).

collection function for the entity that has leased the Short Code by including on the customer's monthly bill charges established by the Short Code holder. The FCC has long held that such billing and collection functions are not common carrier services.¹⁴⁶

IV. AS A MATTER OF POLICY AND LAW, THERE IS NO BASIS TO EXERCISE THE COMMISSION'S ANCILLARY JURISDICTION TO IMPOSE TITLE II NON-DISCRIMINATION REQUIREMENTS ON SMS OR COMMON SHORT CODES

Petitioners argue that, even if SMS and Short Codes are not common carrier services subject directly to Title II obligations, the Commission should nevertheless impose those same obligations through exercise of its ancillary jurisdiction.¹⁴⁷ The Commission's ancillary jurisdiction, however, does not reach that far, and even if it did, there is no market failure justifying the imposition of Title II nondiscrimination requirements on SMS and Short Codes.

A. Applying Core Common Carrier Obligations on Information Services Would Be Inconsistent with the Structure and Intent of the Act

Petitioners argue that the Commission has authority to impose Title II common carrier obligations on SMS and Short Codes, even if they are information services and not CMRS, pursuant to its Title I ancillary jurisdiction.¹⁴⁸ That proposal would stretch ancillary jurisdiction well beyond its bounds.

The Commission's power to regulate utilizing its ancillary jurisdiction is carefully constrained. It may be exercised only if two conditions are met. First, the subject matter of the regulation must fall within the Commission's general jurisdictional grant under

¹⁴⁶ See, e.g., *In the Matter of Audio Communications, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 8697 (1993) (finding that billing and collection for 900 services is not a common carrier service).

¹⁴⁷ Petition at 16.

¹⁴⁸ Petition at 16.

section 152(a) of the Act,¹⁴⁹ and the proposed regulations must also be reasonably ancillary to the Commission's effective performance of its enumerated statutory responsibilities.¹⁵⁰ The proposed regulation must therefore be necessary to achieve one of the Commission's enumerated mandates and it may not be inconsistent with any policy or provision of the Act.¹⁵¹ In any case invoking the Commission's ancillary jurisdiction, it is thus necessary to examine the specific regulatory requirements being proposed. In this instance, the Commission lacks ancillary authority to impose the regulations Petitioners seek.

According to the Petition, imposing non-discrimination requirements on information services furthers the policies embedded in section 202 of the Act and the Commission's broader mandate under section 151 to "make available, so far as possible... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."¹⁵² This overly simplistic argument ignores the implications of the proposed regulation. Petitioners propose that the Commission impose on services that the Commission has found are not common carrier services the quintessential common-carrier obligation to provide service indiscriminately. The proposal is inconsistent with the Act's statutory structure and fails to further any legitimate public interest.

¹⁴⁹ 47 U.S.C. § 152(a).

¹⁵⁰ *American Library Assoc. v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

¹⁵¹ 47 U.S.C. § 154(i) (limiting the FCC's authority to "mak[ing] such rules and regulations and issu[ing] such orders, not inconsistent with this Act, as may be necessary in the execution of its functions").

¹⁵² Petition at 17-18 (quoting 47 U.S.C. § 151).

Congress established two mutually exclusive categories of service, telecommunications services (including CMRS) and information services.¹⁵³ The Act contains no mandate to regulate information services. To the contrary, the “Act’s overall intent [is] to allow information services to develop free from common carrier regulation.”¹⁵⁴ It would be an affront to this statutory construct to designate a service an information service, which Congress intended remain free of common carrier regulation, yet subject the same service to the most central of telecommunications economic regulations, the obligation to serve all indiscriminately.

Petitioners here seek to accomplish exactly the result the Supreme Court previously rejected when it refused to impose common carrier obligations on cable services. Ancillary jurisdiction there was based to the Commission’s regulation of broadcast services and the Act specifically precluded common carrier regulation of broadcast services.¹⁵⁵ The Court held that the imposition of common carrier obligations could not be reasonably ancillary to the FCC duties to regulate broadcasting where Congress had precluded common carrier regulation of broadcasting. It would be similarly unreasonable to impose the core common carrier obligation on services that Congress intended to “develop without the impediments of common carrier regulation.”¹⁵⁶

¹⁵³ *1998 Stevens Report* ¶ 13 (“We conclude . . . that the categories of ‘telecommunications service’ and ‘information service’ in the 1996 Act are mutually exclusive.”).

¹⁵⁴ *Wireless Broadband Order* ¶ 54.

¹⁵⁵ *FCC v. Midwest Video Corp.*, 440 US 689 (1979).

¹⁵⁶ *Wireless Broadband Order* ¶ 54.

B. Common Carrier Regulation Would Be Unnecessary and Counterproductive

Petitioners' claim that extending Title II non-discrimination requirements to SMS and Short Codes is in the public interest is equally unavailing.¹⁵⁷ The Petition identifies no market failure that would warrant such regulatory intervention. To the contrary, the Petition acknowledges the rapid growth, innovation and ubiquitous availability of these services.

Although the Petition posits a parade of horrors if non-discrimination requirements are not extended to "text messaging," the Petition proffers no evidence that any carrier is discriminating in the provision of SMS services. As noted above, Petitioners' allegations solely concern carrier decisions whether to load Short Codes into their network, a service wholly distinct from SMS. The Petition in fact demonstrates that SMS is being rapidly and widely used by individuals and by both commercial and noncommercial interests. It cites numerous examples in which entities as diverse as Climate Citizens, the John Edwards presidential campaign, Aveda, Amnesty International, and the National Alliance for Hispanic Health have used text messaging successfully to promote and support their activities.¹⁵⁸ And while Petitioners vaguely suggest that the alleged ability to discriminate in text messaging will hamper innovation, it elsewhere notes that SMS already has fostered innovative service offerings by third parties.¹⁵⁹ Rather than demonstrating a need for regulatory intervention to ensure the ability to utilize SMS, the Petition shows that the market is working, as one would expect in the robustly competitive wireless marketplace.

¹⁵⁷ Petition at 18.

¹⁵⁸ Petition at 20.

¹⁵⁹ Petition at 14 (noting innovative services developed by Jott and Raketu).

The few examples of carrier refusals to load Short Codes also do not justify applying common carrier obligations on that service. As explained above, Short Codes are simply a marketing tool. Because it is the mobile carrier's subscribers that will interact with the third party marketer or advertiser, the carrier carefully scrutinizes proposed Short Code marketing campaigns. A Short Code applicant must typically inform the carrier how they intend to use the code, what the subscriber experience/message flow will be; what type of advertising or marketing the messaging will include; and what the call-to-action and associated keywords are.¹⁶⁰ Short Code applicants are expected to demonstrate compliance with the industry and Mobile Marketing Association ("MMA") consumer best practices guidelines.¹⁶¹ These guidelines restrict campaigns that contain any of the following: intense profanity or violence; graphic depiction of sexual activity; nudity; hate speech; graphic depiction of illegal drug use; or activities that are restricted by law to those over 18, such as gambling or lotteries.¹⁶²

As described above, the ability to protect customers from fraud, illegal or objectionable material is one that exists solely with carriers. Government regulation in this area has routinely been struck down by the Courts. Moreover, this type of regulation is unnecessary in light of the competitive nature of the wireless marketplace. The

¹⁶⁰ Keywords are short words, typically three letters that identify the specific mobile campaign. For example, in the call-to-action "Text WIN to 47467 to play the BrandY mobile quiz," WIN is the keyword and it identifies the mobile application. Every consumer that texts WIN to that short code wants to play the BrandX mobile quiz. The keyword also controls the routing so messages are not mixed with different advertising or promotional campaigns. Understanding the Common Short Code: Its Use, Administration, and Tactical Elements, <http://mmaglobal.com/modules/article/view.article.php/552>.

¹⁶¹ See, Consumer Best Practices Guidelines, Mobile Marketing Association, Dec. 11, 2007. www.mmaglobal.com.

¹⁶² Mobile Marketing Association, Common Short Code Primer, at 10, <http://mmaglobal.com/modules/article/view.article.php/552>

wireless market is intensely competitive, reflecting the Commission’s decision to regulate wireless services with a light touch and to let the market work. The Commission recently found in its *Twelfth Annual CMRS Report* that “U.S. consumers continue to experience significant benefits – including low prices, new technologies, improved service quality, and choice among providers – from competition in the CMRS marketplace.”¹⁶³ More than half the Nation’s population is served by five or more facilities-based wireless carriers and 90% or more is served by four or more.¹⁶⁴ Entrepreneurs and interest groups thus have multiple carriers from which to choose when developing their Short Code marketing campaigns and the refusal of any one carrier to recognize a Short Code does not preclude the use of other carriers. The Petitioners’ suggestion that more regulation is needed to stimulate investment or ensure choice is belied by this history.

The Petitioners’ demand that carriers provision Short Codes on a common carrier basis is as counterproductive as it is unnecessary. Depriving wireless carriers of the ability to screen out Short Codes will unnecessarily expose wireless customers, including minors, to inappropriate content or unscrupulous business practices by third parties who seek to use short codes to perpetrate fraud. As discussed above, the Commission’s ill-advised policy of requiring carriers to provision 900 services on a common carrier basis significantly hampered the government’s ability to protect consumers from abusive practices. By mandating access and eliminating carriers’ ability to choose with whom to deal, the government was put into the position of trying to regulate directly the content of the messages that could be retrieved by calling a 900 number, including the offering of

¹⁶³ *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Twelfth Report, FCC 08-28, WT Docket No. 07-71, ¶ 1 (rel. Feb. 4, 2008) (“*Twelfth Annual CMRS Report*”).

¹⁶⁴ *Twelfth Annual CMRS Report* at ¶ 38.

pornographic or indecent messages that mushroomed with the advent of 900 services. The result was years of frustration as the FCC and Congress attempted to overcome constitutional and other limitations on their power to regulate indecent or obscene content in order to curb abusive practices through direct regulation of information providers using 900 services. The Commission should not repeat the same mistake here.

C. Petitioner’s Calls For Non-Discriminatory Access To Common Short Codes Violates Wireless Carriers’ Protected First Amendment Rights to Exercise Editorial Discretion

The Petitioners’ demand that wireless carriers provide short codes on a common carrier basis raises serious First Amendment concerns. A wireless carrier’s refusal to carry a short code campaign is an exercise of editorial discretion no different than a broadcaster’s, cable company’s, or newspaper’s refusal to run commercial advertisements or advocacy pieces. At the extreme, broadcasters can not be required to run advertising for competitors – Fox for NBC, CBS for ABC. This is exactly what Petitioners seek, that wireless carriers host advertising campaigns for competitors. The exercise of such editorial discretion, even by a closely regulated speaker such as a broadcaster, is a form of speech protected by the First Amendment of the United States Constitution. As a result, the curtailment of wireless carriers’ discretion in deciding whether to affiliate themselves with any particular campaign must withstand constitutional scrutiny. Petitioners have proffered no evidence or argument that could survive such scrutiny.

1. Editorial Discretion is Protected Under the First Amendment

As the Supreme Court has noted, the history of First Amendment precedents has become somewhat compartmentalized into fact-specific “types” of case, with distinctions being drawn based on the identity of the speaker, *e.g.*, whether it be a newspaper, a cable

system,¹⁶⁵ a broadcaster, or even a parade organizer.¹⁶⁶ As technology and the means of communication continue to evolve, the Court has also recognized that it is difficult to cramp new forms of speech into these existing boxes and thus that there can be no “rigid, single standard, good for now and for all future media and purposes.”¹⁶⁷ There is, however, one bedrock principle: the editorial function by which one chooses which messages to announce is itself protected speech under the First Amendment no matter which “type” of speaker is at issue.¹⁶⁸

Even in the case of a broadcaster, whose First Amendment interests are the most limited, the Supreme Court has held that the simple “compilation of speech by third parties” through the programming selection process is protected speech.¹⁶⁹ The choice of which messages, authored or generated by others, for which a speaker will provide a forum is a protected means of speech regardless of the medium or the speaker.¹⁷⁰ Short code campaigns, by which advertisers or advocacy groups effectively broadcast text messages to thousands of wireless subscribers, is no different. Indeed, one court has likened carriers’ provision of analogous 900 services to broadcasting, finding that, in

¹⁶⁵ *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 740-43 (1996) (discussing history of First Amendment precedents and finding portions of cable forced access rules unconstitutional).

¹⁶⁶ *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 570-77 (1995) (discussing First Amendment rights of parade organizer by analogy to the rights of broadcasters, cable operators, and newspapers).

¹⁶⁷ *Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 742.

¹⁶⁸ *Id.* at 737 (“as this Court has held, the editorial function itself is an aspect of ‘speech.’”).

¹⁶⁹ *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998) (weighing television station’s editorial interest and potential debate participant’s right to coverage).

¹⁷⁰ *See Hurley*, 515 U.S. at 569-70 (discussing the many ways in which the exercise of editorial discretion, including “even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper,” is protected speech under the First Amendment); *see also Columbia Broad. Sys. v. Democratic Nat’ Comm.*, 412 U.S. 94, 112 (1973) (recognizing broadcasters’ right to perform the editorial function even though subject to the fairness doctrine).

offering the capability for thousands of subscribers simultaneously to call a 900 number and listen to recorded messages, “[t]he phone company resembles less a common carrier than it does a small radio station.”¹⁷¹

The rules that Petitioners would have the Commission adopt would prohibit a wireless carrier from exercising its editorial discretion to refuse to provide short codes to entities seeking to promote the sale of pornography, or to spread racist messages, or to defraud their customers. Wireless carriers have every right to reject such campaigns.¹⁷²

2. There is No Evidence That Forced Access to Short Code Marketing Campaigns is Necessary to Further an Important Government Interest

Because the editorial discretion of wireless carriers is protected from abridgement by the First Amendment, any government intrusion upon that right must satisfy rigorous constitutional requirements. A rule implementing forced access to short codes would, at a minimum, be subjected to intermediate scrutiny. Such a rule will survive First Amendment review only if (1) it furthers an important or substantial governmental interest; (2) if the governmental interest is unrelated to the suppression of free expression; and (3) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁷³

Applying the test in this instance, a rule requiring forced access to short code marketing programs would never make it past the first step, much less the remaining steps. The Petition does not support a finding that any important governmental interest

¹⁷¹ *Carlin Communications v. The Mountain States Telephone and Telegraph Co.*, 827 F.2d 1291, 1294 (9th Cir. 1987) (finding that telephone company was free to refuse to provide 976 service to dial-a-porn business).

¹⁷² *Cf. Carlin Communications v. Southern Bell Telephone and Telegraph Co.*, 802 F.2d 1352, 1360-61 (11th Cir. 1986)

¹⁷³ *See, e.g., Turner Broadcasting v. FCC*, 512 U.S. 622, 662 (1994) (“*Turner I*”).

would be served by a forced access rule. Rather, the Petitioners' arguments boil down to the claim that such a regime will make it easier and more convenient for entities to reach putative customers.¹⁷⁴ Although the Petition makes mention of other values such as public health, free speech, and competition,¹⁷⁵ the Petition itself provides no serious support that any of these values are threatened by carriers' exercise of discretion in rejecting harmful or inappropriate common short code marketing campaigns.

Lack of access to short codes does not seriously impede such values because Petitioners or any other entity remain free to access wireless carriers' networks to make phone calls and send messages regardless of the wireless carrier's policies for acceptance of short code marketing campaigns. Nor is there any basis to believe that competition is threatened. The wireless marketplace is highly competitive and no carrier has the ability to exercise market power. Moreover, wireless carriers are under no obligation to provide access to their networks to aid competing carriers' efforts to win customers or divert traffic.

The current legal and regulatory environment allows the proper respect to be given to wireless carriers' First Amendment right to perform the editorial function while protecting Petitioners' interest in spreading their messages by making calls and sending texts—activities that Petitioners are perfectly able to do without participating in one or more carriers' short code marketing services. The fact that some marketers or competitors will have to use ten digit telephone numbers for their marketing campaigns instead of short codes hardly rises to the level of an important government interest

¹⁷⁴ Petition at 22-23.

¹⁷⁵ Petition at 19-24.

justifying the abridgement of wireless carriers' First Amendment rights under the relevant precedents.¹⁷⁶

¹⁷⁶ See, e.g., *Hurley*, 515 U.S. at 577-78 (distinguishing the government's interest in *Turner I* of maintaining the very "survival of the speakers" from the *Hurley* plaintiff's interest in accessing but one more of many outlets for its speech even where that outlet is "an enviable vehicle for dissemination of [its] views."). Moreover, wireless carriers are under no obligation to provide access to their networks to aid competitors.

V. CONCLUSION

The action the Petition calls for is unwarranted and uncalled for as both a matter of law and policy. SMS and Short Codes are undeniably information services, not subject to the common carrier regulation of Title II, and Commission action subjecting an information service to a nondiscrimination requirement is inconsistent with the structure of the Act. Additionally, such an exercise of Commission authority will have the consequence of preventing wireless carriers from responding to consumer demand for protection from spam, fraud, and objectionable or unwanted advertising. The Commission should heed the lessons learned in the 900 number context and dismiss the pending Petition.

Respectfully submitted,

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